

GUARDIANSHIP AND ADMINISTRATION BOARD
LAUNCESTON

Mrs O.T.M. on the application of Ms H.U.

GAB No. XXXX of 2007

REASONS FOR DECISION

Anita Smith (President)
Leon Peck (Board member)
Sue Hill (Board member)

Date of Hearing: 18 October 2007

Guardianship and administration – person with dementia –attorney validly appointed, effect on application for administration – whether ‘informal proceedings’ extend to hearing an application under alternative legislation – effect of notice to parties – irreconcilable differences between sons and daughter of proposed represented person – effect of appointment of attorney on personal decisions

Guardianship and Administration Act 1995 (Tas), ss 6, 11, 53, 69

Powers of Attorney Act 2000 (Tas) s 32

1. The proposed represented person, Mrs O.T.M., is 90 years of age, is widowed and has three adult children, Mr X.M., Mr U.M. and Ms H.U., who was the applicant. Mrs O.T.M. resides in her own home with assistance from the community dementia team and from Ms H.U., Mr U.M. and Mr U.M.’s wife, Mrs N.M.
2. The Board received a Health Care Professional Report from Dr Paul Hanson who confirmed that Mrs O.T.M. has dementia of the Alzheimer’s type and that this has been evident for 3 years. As a result she is unable to reliably make reasonable plans and follow them through nor to determine ‘cause and effect’ relationships. Dr Hanson indicated that Mrs O.T.M. experiences deficits in decision making in the financial domain as well as the domain of personal decisions. Evidence of the level of incapacity Mrs O.T.M. experiences by reason of her disability was not disputed.

3. A hearing was convened on 18 October 2007 and was attended by:
 - Ms H.U. – daughter/applicant
 - Ms M.O. – a friend of Ms H.U. and Mrs O.T.M.
 - Mr X.M. – son
 - Mr U.M. – son/attorney
 - Mrs N.M. – daughter in law
 - Kevin Preece - Office of the Public Guardian
 - Fiona Young – Community Dementia Team

4. Mrs O.T.M. did not attend the hearing as it was generally agreed that to see her children engaged in conflict is detrimental to her wellbeing and such conflict was unavoidable at this hearing. Mr U.M., Mr X.M. and Mrs N.M. gave their evidence in a private session (although Fiona Young was present), the essence of which was communicated to the other witnesses upon their return to the hearing room. Mrs H.U. then also gave some evidence in the absence of the other members of the family.

5. The Board had available to it the documents listed in Appendix “A”. Relevant legislative provisions are listed at Appendix “B”.

The Application for Administration:

6. On 24 June 2007, Mrs H.U. applied for guardianship and administration pursuant to sections 20 and 50 of the *Guardianship and Administration Act 1995* (“the Act”). The application was supported by a pro-forma Health Care Professional Report by Dr Hanson dated 10 July 2007. The application notes that Mrs O.T.M. granted Mr U.M. her enduring power of attorney. While the application did not nominate an administrator, it is clear from the application and the evidence she gave at the hearing that Mrs H.U. is most dissatisfied with the actions of the attorney and seeks either his removal and replacement or a system of supervision of his actions.

7. Complaints about the financial control and decision making by the attorney include complaints that the attorney:
- (a) Has failed to repair household items (e.g. washing machine) and to promptly attend to household maintenance,
 - (b) Refuses to release funds to meet expenses incurred by Mrs H.U. or denies access to meet the costs of Mrs O.T.M.'s living and personal expenses (watch, clothes, shoes, television, magazines, outings)
 - (c) Disables Mrs H.U. from initiating purchases and repair work that she deems in the best interests of her mother
 - (d) Manipulates the trust placed in him as attorney
 - (e) Uses his power over finances to dictate lifestyle and personal needs of Mrs O.T.M.
 - (f) Failed to re-imburse expenses from 2006 when Mrs H.U. acted as a live-in carer
 - (g) Maintains undue secrecy regarding Mrs O.T.M.'s financial situation or fails to consult with Mrs H.U. in making decisions
8. The validity of the instrument appointing Mr U.M. as attorney (Registered Number PAXX/XXXX dated 3 November 2000) was not questioned in the application and there is no reason for the Board to assume anything other than it was regularly executed at a time when Mrs O.T.M. had capacity to make that appointment.
9. Section 53 of the Act states:

“53. Administration order to prevail over enduring power of attorney

(1) Where a proposed represented person has granted an enduring power of attorney under section 11A of the *Powers of Attorney Act 1934* or under section 30 of the *Powers of Attorney Act 2000*, it is not competent for the Board to make an administration order in respect of his or her estate so long as the enduring power of attorney is in force unless the order is made under Part 8.

(2) ...

(3) ...”

There were no circumstances presented in the application that would suggest the requisite level of urgency for the purposes of an order pursuant to Part 8. The Enduring Power of Attorney remains in

force and it appears that it is being used as the exclusive means of financial management for Mrs O.T.M..

10. As the enduring power remains in force and because of the provisions in section 53, the Board considered that it lacked the jurisdiction to hear an application for administration. Therefore the Board restricted the evidence presented at the hearing to that evidence which related to the application for guardianship. This meant that almost all of Mrs H.U.'s complaints about the financial control and decision making by her brother, Mr U.M., were irrelevant to the application. However, because some of the above issues also related to decisions about Mrs O.T.M.'s person and circumstances, the Board did hear evidence in so far as such issues had a guardianship aspect, as is discussed below.

Was There an Application for Review of the Enduring Power of Attorney?

11. Section 11 of the Act permits that the Board is not required to conduct its proceedings in a formal manner and may act without regard for technicalities or legal forms. However, it must act according to equity and good conscience and is bound by the rules of natural justice. The Board gave consideration to whether the application could be deemed to be an application under the *Powers of Attorney Act 2000* in substance rather than form.
12. The Board considered that its permission to disregard technical forms did not extend to substituting an application under the *Powers of Attorney Act 2000* for an application under the *Guardianship and Administration Act 1995* when completely different legislative provisions and tests apply. Further it would be contrary to the rules of natural justice to hear a review of the enduring power of attorney when the notice of hearing delivered on 2 October 2007 to the

attorney, and all other parties, was restricted to guardianship issues.

It stated:

“APPLICATION FOR GUARDIANSHIP ORDER

MRS O.T.M. REF: XXXX NOTICE OF HEARING

The Guardianship and Administration Board has received an application proposing that a guardian be appointed for the above named. You have been named as an interested party in that application.

A guardian can be appointed for an adult person who has a disability, for example an intellectual disability or dementia, and who is unable to make reasonable decisions in relation to his or her lifestyle matters such as accommodation and health care.

(N.B. The applicant’s notice did not contain the above two paragraphs, it is assumed that the applicant understands the basis of his or her application.)

...

The Board may make an order appointing the proposed guardian, appointing an alternative guardian or an order dismissing the application.”

13. The Board noted that Mrs H.U. had previously made an application under the *Powers of Attorney Act 2000* in 2002 to review this appointment but did not proceed following a letter from the Board’s Senior Investigation and Liaison Officer on 13 March 2003 to the effect that (i) all medical evidence received had supported the fact that Mrs O.T.M. had capacity when executing the instrument and still had capacity and (ii) in the absence of further medical evidence the Board would not proceed to a hearing.
14. Mrs H.U. had difficulty accepting that she had made the wrong application on this occasion and persisted with discussion of her mother’s financial issues throughout the hearing, which was ruled irrelevant on each occasion. Because it is still open for Mrs H.U. to make an appropriate application pursuant to the *Powers of Attorney Act 2000* to review the operation of the power, the Board did not

consider an adjournment (and neither was one sought) to amend the application but proceeded to hear the application as an application for guardianship.

The Application for Guardianship:

15. On the basis of Dr Hanson report, the Board was satisfied that Mrs O.T.M. is a person with a disability and that disability renders her unable to make reasonable judgments in respect of matters relating to her person and circumstances.

16. Mrs H.U. sought the appointment of a guardian, in part, for the supervision of her brother's financial decisions pursuant to the enduring power. The Board did not accept this as a valid reason to apply for guardianship for two reasons, (i) guardianship under Part 4 of the Act is clearly intended to be an appointment restricted to non-financial or personal aspects of a represented person's life and (ii) supervision of an enduring power of attorney would be a possible outcome of an application pursuant to Part 4 of the *Powers of Attorney Act 2000* and should be sought by that means. This part of the application was misguided.

17. The balance of the application for guardianship related to the following issues:
 - (a) Mrs H.U. does not have a key to her mother's home but must access the home using a remote control for the adjoining garage door.
 - (b) Mrs H.U. asserts that her brother makes personal decisions on behalf of his mother about access to support services and fails to consult with her about these decisions
 - (c) Alleged lack of stimulation for Mrs O.T.M. from family and friends exacerbated by lack of access to the house key
 - (d) Alleged denial of a mother/daughter relationship by the attorney
 - (e) Lack of communication between the attorney and his sister about decisions about their mother's care

18. At the core of this application was an irreconcilable disagreement between a brother and sister about the management of their parents' estates. Some of this dispute appears to stem from the period in which their father was placed in a nursing home, around 1998, and later died. This historical information was also deemed irrelevant because despite the fact that it relates to the reasons why a brother and sister are so hostile to each other it does not relate to Mrs O.T.M.'s present position and the need or otherwise for the appointment of a guardian. Likewise historical allegations of prior assaults by the brothers upon their sister and a resultant restraint order have little bearing upon Mrs O.T.M.'s wellbeing and were not relevant to the application, except in so far as it related to Mrs H.U.'s access to her mother's home.

Mrs O.T.M.'s Present Circumstances:

19. Witnesses who were independent to the conflict between Mrs H.U. and her brother did not report any deficit in Mrs O.T.M.'s state of health or care arrangements. Dr Hanson believed that Mrs O.T.M. ought to be in an Aged Care facility. However the Dementia Support Team who provides daily care did not believe this kind of care is warranted yet. Fiona Young from that team indicated that Mrs O.T.M. is well cared for and that care arrangements are sufficient for her needs. She indicated that any items that require purchase or care issues that may arise are recorded in a communication book that is available to visiting family members and staff of the support team and are generally acted upon by the attorney.
20. Mr X.M. has withdrawn from active participation in family matters due to the sibling conflict and his own state of health. This includes withdrawing from frequent contact with his mother. However, he spoke at the hearing with great admiration for the loving relationship that Mrs N.M. has established with her mother-in-law and the

tireless efforts that she and Mr U.M. have made to ensure the comfort and safety of Mrs O.T.M.. For this, he appeared extremely grateful. Similarly Mrs N.M. impressed the Board as caring very deeply for Mrs O.T.M. and being prepared to offer whatever support was needed for her care.

21. It is clear too that Mrs H.U. has a deep and loving relationship with her mother and one of mutual dependence and support. It was also clear that she provides intense practical support for her mother and that she is one of the key players in keeping Mrs O.T.M. safe in her own home, even at this advanced age. Having family members with a keen interest in her wellbeing has obviously been a protective factor for Mrs O.T.M.. It is clear though that the sibling conflict causes Mrs H.U. great anxiety which was expressed at the hearing as anger.
22. Dr Hanson and members of the Dementia Support Team acknowledged that the conflict between her children was a matter that perplexes Mrs O.T.M. and at times causes anxiety. However, it is clear that, despite the intensity of their disagreement, the three siblings have in recent times attempted (though not always succeeded) to shield their mother from first hand experience of their mutual hostility.

The Need for a Guardian – Section 20(1)(c)

23. Given that none of the family members are presently contemplating a change in accommodation, employment or health care (relevant to subsection 25(2)(a), (b), (c) and (e) of the Act), the Board considered the allegations that Mr U.M. was impeding Mrs H.U.'s relationship with her mother (subsection 25(2)(d)) to be the issue of most relevance to an application for guardianship.

24. Mrs H.U. readily agreed, however, that she sees her mother most days and indeed lived at her mother's home for a period of weeks in 2006 in order to provide support while Mrs O.T.M. successfully recovered from a cracked femur. Therefore the Board could not deduce from the evidence that any restrictions had been placed upon the relationship between mother and daughter such that would require the intervention of a guardian to assume decision making powers pursuant to subsection 25(2)(d).
25. The attorney's decision not to grant a key to his sister is an unusual decision and clearly has become the focus of a great deal of the tension between siblings. Whether this is strictly an attorney's decision is a moot point, but the issue for the Board is whether the denial of a key warrants the appointment of a guardian.
26. Apparently the only means by which the sibling relationship can be managed now is through avoidance. Mr U.M. explained that enabling Mrs H.U. access with the garage-door remote control gave him or his wife early warning or protection against unexpectedly meeting with Mrs H.U. in their mother's house. That is, while they are in attendance at Mrs O.T.M.'s house, they disable the door. They reactivate it when they leave. If Mrs H.U. had the door key, meetings could not be anticipated and therefore could not be avoided. Mrs N.M. stated that if she could not be certain that she could avoid Mrs H.U. in this way she would not feel safe to continue giving Mrs O.T.M. day-to-day care.
27. Apparently at times the garage door had remained deactivated for extended periods after Mr U.M. and Mrs N.M. left, however this only meant that Mrs H.U. had to knock on the front door to gain entry to her mother's house. The Board did not condone the decision Mr U.M. made with regard to the key, particularly because as a consequence

Mrs O.T.M. herself does not have a key, but did not believe it warranted the appointment of a guardian given the frequency with which Mrs H.U. has access even without a key.

28. In terms of Mrs O.T.M. having outings, evidence from Mr U.M. and Mrs N.M. was that, as a symptom of her disability, Mrs O.T.M. senior is now extremely anxious about leaving her home. When she is away she frets about being back at home and that anxiety does not abate for some hours after her return, making any trip an unpleasant ordeal for all involved. Mrs H.U. disputed that this behaviour is a product of the disability. However the Board accepted this evidence as credible and consistent with other descriptions of the level of disability Mrs O.T.M. now has.
29. Other evidence offered by Mrs H.U. saw the failure to repair a stove and washing machine over a long period of time as evidence of a failure to accord proper care by the attorney. However, he explained that the stove had been attended to by an electrician who disabled some of the plates for safety reasons. Further, he had decided not to repair the washing machine to prevent Mrs O.T.M. from attempting her own laundry because she is now too frail but would attempt to do it if the opportunity was there. Mr U.M. has arranged for a laundress who manages most of the laundry, with some assistance from Mrs N.M. and Mrs H.U.. While Mrs H.U. clearly believed these measures to be an unreasonable denial of Mrs O.T.M.'s personal dignity, the Board viewed them as a practical approach to Mrs O.T.M.'s age and level of fitness.
30. Mrs H.U.'s denial regarding Mrs O.T.M.'s experience of outings from the home and her fitness for undertaking tasks like laundry caused the Board to have concerns that she may not have a clear insight into the level of disability that Mrs O.T.M. now experiences.

31. Despite the emotive language of the application there was no material evidence before the Board that could satisfy it that Mrs O.T.M. is (i) not enjoying the best possible quality of life in all of the circumstances, (ii) at risk of extreme depression, (iii) lacking in stimulation from family and friends, (iv) materially impeded in maintaining a relationship with her daughter, or (iv) lacking in basic daily necessities.

32. It was evident to the Board was that Mrs O.T.M. had, in 2000, made a conscious and determined decision to hand a very significant level of control over her decision making to Mr U.M. by granting him her enduring power of attorney. Mr U.M.'s actions have since been broadly consistent with that decision. Mrs H.U. desires a greater level of control in decisions about her mother and deeply resents the almost exclusive exercise of that power by Mr U.M.. It is often the Board's experience in this jurisdiction that control over a person's funding naturally extends into a certain level of control over their personal decisions. However, that die has been cast by Mrs O.T.M. herself and there is no call, in the Board's opinion, to alter that by the appointment of a guardian.

33. Mrs O.T.M.'s best interests would be better served if her adult children were not engaged in this conflict. However, the Board is not satisfied that the appointment of a guardian would promote Mrs O.T.M.'s best interests, as it is not conceivable that such an appointment could dilute the hostility between siblings. Further, the alleged restrictions presently imposed upon Mrs O.T.M.'s freedom of decision and action have been made on either rational grounds, or pursuant to the enduring power of attorney or as a practical response to the continuing conflict between her children and are less restrictive than the appointment of a guardian.

CONCLUSION

After hearing an application by Ms H.U. of Launceston for the appointment of a guardian and an administrator in respect of Mrs O.T.M. also of Launceston the Board was not satisfied that Mrs O.T.M. was in need of a guardian and further the Board being satisfied that Mrs O.T.M. has granted an enduring power of attorney under section 11A of the *Powers of Attorney Act 1934* it is therefore not competent for the Board to make an administration order in respect of her estate

THE BOARD ORDERS that the application is dismissed.

Anita Smith
PRESIDENT

Sue Hill
BOARD MEMBER

Leon Peck
BOARD MEMBER

Statement of reasons delivered 20.11.07

APPENDIX “A”

Documents in papers supplied to the Board members:

Materials from Current Application:

Application for Guardianship and Administration dated 24 June 2007

Health Care Professional Report by Dr Hanson on 7 July 2007

Extract from Centrelink Health Professional Assessment dated 21 July 2006

File Note by GAB Registrar dated 22 August 2007

Email file note by Letter from GAB Senior Investigation and Liaison Officer dated 15 October 2007.

Materials from 2002 Application:

Confidential letter from Dr Merhulik to GAB Senior Investigation and Liaison Officer dated 26 August 2002

Letter from GAB Senior Investigation and Liaison Officer to Mrs H.U. dated 29 October 2002

Letter from Dr Mujkic to GAB Senior Investigation and Liaison Officer dated 21 January 2003

Letter from GAB Senior Investigation and Liaison Officer to Mrs H.U. dated 30 January 2003

Letter from Mrs H.U. to GAB Senior Investigation and Liaison Officer dated 12 February 2003

Letter from GAB Senior Investigation and Liaison Officer to Mrs H.U. dated 13 March 2003

There are references in these papers to Mr U.M. supplying a written response to the allegations in the application. No response was received.

The Board had available to it at the hearing the file which contains all correspondence from both applications. However the Board did not refer to that file in making its decision, with one exception. That exception was that in preparation of this statement of reasons the date and registration number of the Enduring Power of Attorney recorded in paragraph 8 was obtained from the file.

APPENDIX “B”

Relevant Legislative Provisions

Provisions of the *Guardianship and Administration Act 1995*

6. Principles to be observed

A function or power conferred, or duty imposed, by this Act is to be performed so that –

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and
- (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

11. Procedure of Board

(1) ...

(2) The Board –

- (a) must, in hearing any matter, act according to equity and good conscience without regard to technicalities or legal forms; and
- (b) is bound by the rules of natural justice; and
- (c) is not required to conduct its proceedings in a formal manner.

(3) ...

(4) The Board is not bound by the rules of evidence but may inform itself in relation to any matter in such manner as it thinks fit.

(5) - (17) ...

20. Guardianship order

(1) If the Board, after a hearing, is satisfied that the person in respect of whom an application for an order appointing a guardian or an order appointing an administrator is made–

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances; and
- (c) is in need of a guardian–

the Board may make an order appointing a full or limited guardian in respect of that person and any such order may be subject to such conditions or restrictions as the Board considers necessary.

(2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of that person's freedom of decision and action.

(3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.

(4) – (6) ...

25. Authority of full guardian

(1) A guardianship order appointing a full guardian confers on the full guardian in respect of the represented person all the powers and duties which the full guardian would have in Tasmania if he or she was a parent and the represented person his or her child.

(2) Without limiting subsection (1), an order appointing a full guardian confers on the person named as full guardian the power –

(a) to decide where the represented person is to live, whether permanently or temporarily; and

(b) to decide with whom the represented person is to live; and

(c) to decide whether the represented person should or should not be permitted to work and if so –

(i) the nature or type of work; and

(ii) the person for whom the represented person is to work; and

(iii) any related matters; and

(d) to restrict visits to a represented person to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person;

(e) except as provided in Part 6, to consent to any health care that is in the best interests of the represented person and to refuse or withdraw consent to any such treatment.

(3) - (4) ...

50. Application for administration order

(1) A person may apply to the Board for an administration order in favour of himself, herself or any other person in respect of the estate of a person with a disability.

(2) Where a person with a disability who is of or over the age of 18 years does not reside in Tasmania but has an estate the whole or part of which is in Tasmania, any person may apply to the Board for an administration order in respect of so much of the estate as is in Tasmania.

(3) An application under this section –

(a) is to be lodged with the registrar; and

(b) is to contain the prescribed information; and

(c) is to be accompanied by the written consent of the person proposed as administrator, if any, to act as administrator.

53. Administration order to prevail over enduring power of attorney

(1) Where a proposed represented person has granted an enduring power of attorney under section 11A of the *Powers of Attorney Act 1934* or under section 30 of the *Powers of Attorney Act 2000*, it is not competent for the Board to make an administration order in respect of his or her estate so long as the enduring power of attorney is in force unless the order is made under Part 8.

(2) If any such enduring power of attorney relates to part only of the estate of the proposed represented person, the Board may make an administration order relating to any part of the represented person's estate that is not subject to the enduring power of attorney.

(3) Notwithstanding subsection (1), any action taken by a person purporting to act under an administration order before he or she has notice of an enduring power of attorney is valid and effectual.

69. Notice of hearing

(1) The Board must, as soon as practicable after receipt of an application under this Act and in any case not less than 10 days before a hearing by the Board, give notice of the hearing to –

- (a) the applicant; and
- (b) the person in respect of whom the hearing is to be held; and
- (c) the Public Guardian; and
- (d) if the person has a guardian, the guardian; and
- (e) if the person has an administrator in respect of his or her estate, the administrator; and
- (f) if the matter relates to the provision of medical or dental treatment, the registered practitioner proposing to carry out the treatment; and
- (g) any other person who the Board is satisfied has a proper interest in the matter.

(2) A notice under subsection (1) is to specify–

- (a) the time and place of the hearing; and
- (b) the nature of the proceedings; and
- (c) the kinds of orders that may be made by the Board; and
- (d) in the case of a notice given under subsection (1)(a) or (b), the entitlement of that person to representation before the Board.

(3) ...

74. Statement of reasons

(1) A person aggrieved by a determination of the Board may, by notice in writing given to the Board within 21 days after the making of the determination, request the Board to give to that person a statement in writing of reasons for the determination.

(2) The Board must, as soon as practicable but in any case within 21 days after receiving a request under subsection (1), prepare and give a statement of reasons to that person.

Provisions of the *Powers of Attorney Act 2000*

30. Creation and effect of enduring powers of attorney

(1) A power of attorney is an enduring power of attorney for the purposes of this Act if it is created –

- (a) by deed containing words indicating an intention that the authority conferred is to be exercisable notwithstanding the donor's subsequent mental incapacity or in the event of the donor's subsequent mental incapacity; or
- (b) by an instrument in accordance with form 3, conferring on the attorney particular powers specified in it; or
- (c) by an instrument in accordance with form 4, conferring on the attorney powers to do all things that the donor may lawfully authorise an attorney to do.

(2) A deed or instrument is not effective to create an enduring power of attorney unless –

- (a) the donor understands the nature and effect of the deed or instrument; and
- (b) there are at least 2 attesting witnesses to the deed or instrument neither of whom is a party to it nor a relation of a party to it and each of whom has witnessed it in the presence of the donor and each other; and

(c) the deed or instrument has endorsed on it, or annexed to it, a statement of acceptance in accordance with form 3 or 4, or in a form to the same effect, executed by the person appointed to be the attorney.

(3) For the purposes of subsection(2)(a), a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:

(a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;

(b) when the power begins;

(c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;

(d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;

(e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;

(f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

(4) An act done by the attorney under a power conferred by an enduring power of attorney during a period of mental incapacity of the donor of the power is as effective as if the donor were competent and not subject to a mental incapacity.

31. Scope of authority, &c., of attorney under enduring power of attorney

(1) An enduring power of attorney –

(a) may confer general authority in accordance with subsection (2) on the attorney to act on the donor's behalf in respect of all or a specified part of the property and affairs of the donor or may confer on him or her authority to do specified acts on the donor's behalf; and

(b) may be expressed to operate only during such period as may be specified in the power of attorney –

and, in any such case, the authority may be conferred subject to conditions or restrictions.

(2) Where an instrument is expressed to confer general authority on the attorney, it operates to confer, subject to any conditions or restrictions specified in the deed or instrument, authority to do on behalf of the donor any act which the donor can lawfully do by an attorney.

(3) - (5) ...

32. Duties of attorney under enduring power of attorney

(1) An attorney under an enduring power of attorney, during any period of mental incapacity of the donor –

(a) is taken to be a trustee of the property and affairs of the donor according to the tenor of the power; and

(b) must exercise his or her powers as attorney to protect the interests of the donor –

and, if he or she fails to do so, is liable to compensate the donor for any loss occasioned by the failure.

(2) - (3) ...

33. Power of Board to make orders in respect of enduring power of attorney

(1) The Board may –

- (a) of its own motion; or
- (b) on application by an attorney; or
- (c) on application by or on behalf of a donor; or
- (d) on application by any other person who the Board believes has a proper interest in the matter –

hold a hearing in accordance with Division 1 of Part 10 of the *Guardianship and Administration Act 1995* to review an enduring power of attorney.

(2) On the review, the Board may, by order –

- (a) vary a term of, or a power conferred by, the enduring power of attorney; or
- (b) appoint a substitute attorney; or
- (c) appoint an administrator of the estate of the donor if he or she is over the age of 18 years; or
- (d) declare that the donor did or did not have mental capacity to make a valid enduring power of attorney; or
- (e) declare that the enduring power of attorney is invalid if the Board is satisfied that –
 - (i) the donor did not have the mental capacity to make it; or
 - (ii) it does not comply with the other requirements of this Act; or
 - (iii) it is invalid because the donor was induced to make it by dishonesty or undue influence or invalid for any other reason; or
- (f) revoke the enduring power of attorney and, if the donor is over the age of 18 years and the Board thinks fit, appoint an administrator of his or her estate; or
- (g) make such other order as to the exercise of the power, or the construction of its terms, as the Board thinks fit.

(3) An appointment of a person as administrator under subsection(2)(f) has the same effect as if it had been made under Part 7 of the *Guardianship and Administration Act 1995*.

(4) ... (6) ...

(7) An order under this section may be made subject to such terms and conditions as the Board thinks fit.

(8) ...